

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID FOSTER CLARK, JR.,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:14-CV-03154-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 16, 21. Attorney Thomas Bothwell represents David Foster Clark, Jr. (Plaintiff); Special Assistant United States Attorney Franco L. Becia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **DENIES** Defendant's Motion for Summary Judgment; **GRANTS, in part**, Plaintiff's Motion for Summary Judgment, and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on August 2, 2011, alleging disability

1 beginning May 1, 2009. Tr. 11. The applications were denied initially and upon
2 reconsideration. Tr. 142-148, 151-156. Administrative Law Judge (ALJ) Wayne
3 Araki held a hearing on August 5, 2013, at which Plaintiff, represented by counsel,
4 testified as did vocational expert (VE) Scott Whitmer. The ALJ issued an
5 unfavorable decision on August 28, 2013. Tr. 8-28. The Appeals Council denied
6 review. Tr. 1-6. The ALJ's August 2013 decision became the final decision of the
7 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
8 405(g). Plaintiff filed this action for judicial review on October 16, 2014. ECF
9 No. 1, 4.

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing transcript, the
12 ALJ's decision, and the briefs of the parties. They are only briefly summarized
13 here.

14 Plaintiff was thirty nine years old at the time of the hearing. Tr. 96. Plaintiff
15 graduated from high school and attended college for some time but did not receive
16 a degree. Tr. 46-47. Plaintiff has worked as a fast food services manager, produce
17 sorter, food server, housekeeping cleaner, and fast food worker. Tr. 89.

18 Plaintiff testified that he cannot work due to a combination of stomach
19 issues and anxiety. Tr. 41. Plaintiff takes Zoloft, lorazepam, and trazodone for his
20 mental impairments, but testified that the medication makes it hard for him to
21 focus and makes his stomach hurt. Tr. 43-45. Plaintiff also took Aderall to help
22 him focus in school, but it did not help him. Tr. 45-46. Plaintiff testified that he
23 takes antidepressants for his irritable bowel syndrome (IBS). Tr. 55. Plaintiff
24 stated that he has had a medical marijuana card since 2009 or 2010 and he uses
25 marijuana to help calm his stomach, eat, and sleep. Tr. 56.

26 Plaintiff estimated that, in an eight hour workday, his stomach issues would
27 likely make him unproductive for four or five hours a day. Tr. 62. Plaintiff
28 testified that his anxiety makes it hard to focus and concentrate and makes him

1 forgetful. Tr. 63. Plaintiff also stated he experiences uncontrollable shaking in his
 2 hands, and sometimes his whole body, on account of his anxiety. Tr. 316.

3 **STANDARD OF REVIEW**

4 The ALJ is responsible for determining credibility, resolving conflicts in
 5 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
 6 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
 7 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
 8 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
 9 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
 10 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
 11 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
 12 another way, substantial evidence is such relevant evidence as a reasonable mind
 13 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
 14 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
 15 interpretation, the court may not substitute its judgment for that of the ALJ.
 16 *Tackett*, 180 F.3d at 1097; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595,
 17 599 (9th Cir. 1999). Nevertheless, a decision supported by substantial evidence
 18 will still be set aside if the proper legal standards were not applied in weighing the
 19 evidence and making the decision. *Browner v. Secretary of Health and Human*
 20 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence supports the
 21 administrative findings, or if conflicting evidence supports a finding of either
 22 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
 23 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

24 **SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process
 26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 27 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 28 through four, the burden of proof rests upon claimants to establish a prima facie

1 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
2 burden is met once claimants establish that physical or mental impairments prevent
3 them from engaging in their previous occupations. 20 C.F.R. §§ 404.1520(a)(4),
4 416.920(a)(4). If claimants cannot do their past relevant work, the ALJ proceeds
5 to step five, and the burden shifts to the Commissioner to show that (1) the
6 claimants can make an adjustment to other work, and (2) specific jobs exist in the
7 national economy which claimants can perform. *Batson v. Comm'r of Soc. Sec.*
8 *Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an
9 adjustment to other work in the national economy, a finding of “disabled” is made.
10 20 C.F.R. §§ 404.1520(a)(v), 416.920(a)(4)(v).

11 ADMINISTRATIVE DECISION

12 On August 28, 2013, the ALJ issued a decision finding Plaintiff was not
13 disabled as defined in the Social Security Act.

14 Preliminarily, for purposes of Plaintiff’s DIB application, the ALJ found that
15 Plaintiff met the insured status requirements through June 30, 2011.

16 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
17 activity since May 1, 2009, the alleged onset date. Tr. 13.

18 At step two, the ALJ determined Plaintiff had the following severe
19 impairments: IBS and attention deficit hyperactivity disorder (ADHD). Tr. 13.

20 At step three, the ALJ found Plaintiff did not have an impairment or
21 combination of impairments that met or medically equaled the severity of one of
22 the listed impairments. Tr. 16. The ALJ found Plaintiff had the following residual
23 function capacity (RFC):

24 lift or carry 50 pounds occasionally and 25 pounds frequently. He has no
25 restrictions standing, walking and sitting. [Plaintiff] should not climb
26 ladders, ropes or scaffolds. He can remember, understand and carry out
27 instructions and tasks generally associated with occupations with a specific
28 vocational preparation (SVP) level of 1 to 4. [Plaintiff] needs to work in a
setting where he is no more than approximately 100 feet from a bathroom.

Tr. 17.

1 At step four, the ALJ concluded that Plaintiff was able to perform his past
2 relevant work as a sandwich maker, fast food worker, agricultural produce sorter,
3 and agricultural produce packer. Tr. 23.

4 The ALJ did not reach step five as the ALJ found Plaintiff not disabled at
5 step four. The ALJ thus concluded Plaintiff was not under a disability within the
6 meaning of the Social Security Act at any time from May 1, 2009, through the date
7 of the ALJ's decision, August 28, 2013. Tr. 24.

8 ISSUES

9 The question presented is whether substantial evidence supports the ALJ's
10 decision denying benefits and, if so, whether that decision is based on proper legal
11 standards. Plaintiff contends the ALJ erred by (1) failing to find Plaintiff's mental
12 impairments severe at step two, (2) failing to properly credit Plaintiff's testimony
13 about the severity of his symptoms, (3) failing to accord adequate weight to the
14 opinions of Plaintiff's treating and examining medical providers, and (4) failing to
15 conduct an adequate step four analysis.

16 DISCUSSION

17 A. Step Two

18 Plaintiff argues the ALJ erred in finding his depression, anxiety, and
19 personality disorder did not each rise to the level of a severe impairment at step
20 two of the sequential evaluation process. ECF No. 16 at 11, 19 n.1.

21 The step-two analysis is "a de minimis screening device used to dispose of
22 groundless claims." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An
23 impairment is "not severe" if it does not "significantly limit" the ability to conduct
24 "basic work activities." 20 C.F.R. §§ 404.1521(a), 416.921(a). Basic work
25 activities are "abilities and aptitudes necessary to do most jobs." 20 C.F.R. §
26 416.921(b). "An impairment or combination of impairments can be found not
27 severe only if the evidence establishes a slight abnormality that has no more than a
28 minimal effect on an individual's ability to work." *Smolen v. Chater*, 80 F.3d

1 1273, 1279 (9th Cir. 1996) (internal quotation marks omitted). A claimant's own
 2 statement of symptoms alone will not suffice. *See* 20 C.F.R. §§ 404.1508,
 3 416.908.

4 **1. Anxiety**

5 The ALJ found Plaintiff's anxiety not severe because Plaintiff seemed to
 6 exaggerate his anxiety symptoms (possibly for purposes of secondary gain), his
 7 treatment providers did not observe symptoms, and he reported that he was usually
 8 happy. Tr. 15.

9 The ALJ erred in not finding Plaintiff's anxiety a severe impairment at step
 10 two. As discussed in more detail *infra*, numerous acceptable medical sources
 11 diagnosed Plaintiff with an anxiety disorder. *See* Tr. 399, 467, 683, 758. Phillip
 12 Dove, M.D., diagnosed Plaintiff with anxiety and observed Plaintiff "project[s] all
 13 of the responsibility on to others, does not own the management, . . . speaks very
 14 highly of [himself] and poorly of others, [and] . . . is reluctant to [make] any
 15 changes." Tr. 683. In a mental medical source statement dated July 24, 2013,
 16 Minninder Sandu, M.D., also diagnosed Plaintiff with anxiety and stated that his
 17 anxiety "seems to interfere in [his] daily functioning."¹ Tr. 757-758. Dr. Sandu
 18 further found Plaintiff was irritable, had conflict with authority figures, had trouble
 19 getting along with others, and that his anxiety impaired his attention and
 20 concentration. Tr. 757.

21 Based on the number of medical providers who diagnosed Plaintiff with
 22 anxiety, and the fact that certain providers assessed functional limitations
 23 associated with anxiety, the evidence establishes that Plaintiff's anxiety is more
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25 ¹Dr. Sandu rendered this opinion prior to the date of the ALJ's decision, but
 26 Plaintiff did not submit this opinion until after the ALJ's decision. The Appeals
 27 Council considered Dr. Sandu's mental medical source statement, Tr. 5, but did not
 28 find reason to review the ALJ's decision, Tr. 1.

1 than “a slight abnormality” and “has . . . more than a minimal effect on . . .
2 [Plaintiff’s] ability to work.” *Smolen*, 80 F.3d at 1279. The ALJ erred by not
3 finding Plaintiff’s anxiety a severe impairment. The reasons given by the ALJ to
4 find Plaintiff’s anxiety non-severe mostly had to do with Plaintiff’s credibility and
5 how the ALJ weighed the medical evidence. It does not appear the ALJ applied a
6 “de minimis” standard in evaluating whether Plaintiff’s anxiety was severe.

7 **2. Personality Disorder**

8 The ALJ found Plaintiff’s personality disorder not severe. The ALJ
9 reasoned that Plaintiff had “a history of jobs that entailed working with the public,”
10 he typically interacted well with treatment providers, and he reported he regularly
11 hung out with his friends. Tr. 14-15.

12 Dr. Schneider and Dr. Donaldson diagnosed Plaintiff with different types of
13 personality disorders. *See* Tr. 399 (narcissistic and avoidant personality disorders),
14 510 (antisocial personality disorder). Dr. Schneider questioned whether Plaintiff
15 would be able to function in the workplace given how he was “guarded and thin-
16 skinned,” had a “defiant attitude” towards authority figures, “sees himself as better
17 than others,” and “externalizes the blame for things onto most other people.” Tr.
18 398-399. Dr. Donaldson observed similar behavior noting Plaintiff “externalized
19 blame for his dysfunction to everyone else in his life.” Tr. 510. Although the ALJ
20 gave no weight to Dr. Schneider’s opinions and partial weight to Dr. Donaldson’s
21 opinions, the Court concludes *infra* that the ALJ partially erred in evaluating these
22 opinions.

23 Based on the diagnoses and limitations assessed by Drs. Schneider and
24 Donaldson, the evidence establishes that Plaintiff’s personality disorder is more
25 than “a slight abnormality” and “has [] more than a minimal effect on . . .
26 [Plaintiff’s] ability to work.” *Smolen*, 80 F.3d at 1279. The ALJ erred by not
27 finding Plaintiff’s personality disorder a severe impairment. Again, the ALJ’s
28 reasoning provides grounds to question the severity of Plaintiff’s personality

1 disorder, but Plaintiff presented enough evidence of a personality disorder to meet
2 his “de minimis” burden at step two.

3 **3. Depression**

4 Unlike the medical evidence supporting Plaintiff’s anxiety and personality
5 disorder, there is little medical evidence supporting Plaintiff’s alleged depression.
6 Although Plaintiff reported at times that he felt depressed, no acceptable medical
7 source diagnosed him with a depressive disorder. A claimant’s own statement of
8 symptoms will not support finding an impairment severe at step two. *See* 20
9 C.F.R. §§ 404.1508, 416.908. The ALJ did not err in finding Plaintiff’s depression
10 not severe.

11 **B. Credibility**

12 Plaintiff contests the ALJ’s adverse credibility determination in this case.
13 ECF No. 16 at 16-18.

14 It is generally the province of the ALJ to make credibility determinations,
15 *Andrews*, 53 F.3d at 1039, but the ALJ’s findings must be supported by specific
16 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
17 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s
18 testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d
19 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
20 “General findings are insufficient: rather the ALJ must identify what testimony is
21 not credible and what evidence undermines the claimant’s complaints.” *Lester*, 81
22 F.3d at 834.

23 The ALJ found Plaintiff’s self-report “not entirely reliable.” Tr. 19. The
24 ALJ reasoned that Plaintiff was less than credible because his symptom reporting
25 was contrary to the medical evidence, his activities of daily living (ADL), and his
26 prescribed treatment. The ALJ also reasoned that Plaintiff made inconsistent
27 statements about unemployment benefits and ability to work and was possibly
28 motivated by secondary gain. Tr. 16, 19-21. Furthermore, the ALJ noted that

1 Catherine Donaldson, M.D., an examining physician, commented that Plaintiff was
2 possibly malingering. Tr. 15, 22 (citing Tr. 209).

3 **1. Contrary to the Objective Medical Evidence**

4 The ALJ found that the medical evidence does not support Plaintiff's
5 subjective complaints. Tr. 20-21.

6 Although it cannot serve as the sole ground for rejecting a claimant's
7 credibility, objective medical evidence is a "relevant factor in determining the
8 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261
9 F.3d 853, 857 (9th Cir. 2001).

10 Regarding Plaintiff's IBS, the ALJ noted Plaintiff's "workup at Yakima
11 Gastroenterology Associates was essentially negative." Tr. 20. The ALJ pointed
12 out that a physician at that clinic did not feel comfortable filling out disability
13 paperwork for Plaintiff based on his IBS. Tr. 20 (citing Tr. 441).

14 Regarding Plaintiff's ADHD, the ALJ noted that Plaintiff's examining
15 medical providers found Plaintiff's memory, concentration, and ability to maintain
16 attention to be normal. Tr. 20-21. The ALJ further noted that Plaintiff's treatment
17 records do not describe Plaintiff as hyperactive or unable to sit still. Tr. 21.

18 The Court concluded *supra* that the ALJ erred by not finding Plaintiff's
19 anxiety and personality disorder to be severe impairments. The Court concludes
20 *infra* that the ALJ erred in evaluating some of the medical evidence. Given these
21 errors, on remand the ALJ will need to reevaluate the medical evidence. Whether
22 the objective medical evidence provides a legitimate basis to discredit Plaintiff's
23 subjective complaints will depend on the ALJ's conclusions after the ALJ takes
24 into account Plaintiff's anxiety and personality disorder, further evaluates the
25 evidence, and supplements the record.

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1 **2. ADL**

2 The ALJ's second reason for finding Plaintiff less than credible, i.e. that
3 Plaintiff's activities cast doubt on his alleged limitations, Tr. 21, is a specific, clear,
4 and convincing reason to undermine Plaintiff's credibility.

5 "[D]aily activities may be grounds for an adverse credibility finding if a
6 claimant is able to spend a substantial part of his day engaged in pursuits involving
7 performance of physical functions that are transferable to a work setting." *Orn v.*
8 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (internal quotation marks omitted). A
9 claimant need not be "utterly incapacitated," however, to be eligible for benefits.
10 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

11 The ALJ noted that Plaintiff reported being able to apply for work, do
12 housework, prepare meals, take care of his child every other weekend, drive, shop,
13 read, watch television, maintain an aquarium, and operate a part-time tie-dye
14 business. Tr. 21 (citing Tr. 282-285, 316-323, 640, 737, 744).

15 Because the ALJ did not find that Plaintiff was "able to spend a substantial
16 part of his day engaged in pursuits involving performance of physical functions
17 that are transferable to a work setting," *Orn*, 495 F.3d at 639, Plaintiff's activities
18 alone would not provide a clear and convincing reason to find Plaintiff not
19 credible. Plaintiff's activities do, however, indicate that he can live independently
20 and he is capable of a wide range of tasks. The ALJ did not err in citing Plaintiff's
21 activities as a reason to question the severity of his impairments, but this reason
22 standing alone would not support an adverse credibility determination.

23 **3. Impairments Treated with Medication**

24 The ALJ made some observations about Plaintiff's use of prescription
25 medication, although it is unclear how the evidence cited by the ALJ serves to
26 discredit Plaintiff.

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1 The fact that a claimant's impairments can be remedied by treatment or
2 medication is a legitimate reason for discrediting the claimant's testimony. *Warre*
3 *v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).

4 The ALJ noted that Plaintiff was not taking "any medication specifically
5 prescribed for his gastrointestinal complaints." Tr. 19. The ALJ also noted
6 inconsistencies regarding whether Aderall alleviated Plaintiff's ADHD symptoms.
7 Tr. 20.

8 How the ALJ intended to use his observations about Plaintiff's use (or lack
9 of use) of prescription medication to discount Plaintiff's credibility is not entirely
10 clear. It is not clear if the ALJ found that Plaintiff was prescribed medication for
11 his gastrointestinal complaints and did not take the medication or if Plaintiff's
12 providers never prescribed him any medication. Both reasons, if supported by
13 substantial evidence, could potentially serve to discredit Plaintiff. But the ALJ's
14 reasoning is not specific enough to be valid. Furthermore, there is some indication
15 that Plaintiff was unable to afford the medication and treatment prescribed by
16 Gonzalo M. Pandolfi, M.D., for Plaintiff's abdominal issues. *See* Tr. 378-379. A
17 claimant's failure to follow a course of treatment may be excused if the claimant
18 cannot afford the treatment. *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995).

19 Likewise, it is unclear how Plaintiff's inconsistent use and reaction to
20 Aderall undermines his credibility. The ALJ fails to articulate whether Plaintiff
21 did not take Aderall as it was prescribed to him or whether Plaintiff was simply
22 inconsistent about reporting its effect. The fact that Plaintiff had varying reactions
23 to Aderall is documented in the medical evidence as Plaintiff's medical providers
24 adjusted his dosage trying to find a dosage that work well for him. *See, e.g.*, Tr.
25 388 (Dr. Schneider noting how Plaintiff worked with his treating sources to find
26 the right dosage of Aderall); *see also* Tr. 395 (Plaintiff reporting he "is real
27 sensitive to medications").

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1 On remand, the ALJ should clarify how Plaintiff's use (or lack of use) of
2 prescription medication undermines Plaintiff's credibility. The ALJ should also
3 consider whether Plaintiff's noncompliance with his treatment or medication could
4 be excused because he could not afford it.

5 **4. Failure to Comply with Treatment**

6 The ALJ cited some instances where Plaintiff failed to comply with a
7 prescribed course of treatment. The ALJ noted Plaintiff "canceled a nutrition
8 follow up appointment and declined to reschedule." Tr. 19 (citing Tr. 628). The
9 ALJ noted that Dr. Dove recommended Plaintiff quit smoking, which might
10 improve his IBS. Tr. 20 (citing Tr. 683). The ALJ noted that Plaintiff continued to
11 smoke cigarettes. Tr. 20.

12 The ALJ may rely on unexplained or inadequately explained failure to seek
13 treatment or to follow a prescribed course of treatment to discount a claimant's
14 credibility. *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012).

15 The ALJ did not err in reasoning that Plaintiff's failure to continue his
16 nutrition appointments undermined his subjective complaints. Plaintiff's treating
17 providers often recommended that changing his diet might help his IBS. *See* Tr.
18 365, 369, 377, 381. Plaintiff's unwillingness to pursue such changes would tend to
19 indicate that his impairments are not as serious as he alleges.

20 The fact that Plaintiff failed to quit smoking, however, is not a clear and
21 convincing reason. "Given the addictive nature of smoking, the failure to quit is as
22 likely attributable to factors unrelated to the effect of smoking on a person's
23 health." *Shramek v. Apfel*, 226 F.3d 809, 813 (7th Cir. 2000); *see also id.* (holding
24 a claimant's failure to comply with a diagnosis to quit smoking "is an unreliable
25 basis on which to rest a credibility determination"). Even though Plaintiff's
26 smoking may have contributed to his IBS, the fact that he did not quit as
27 recommended by Dr. Dove does not necessarily undermine Plaintiff's credibility.

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5. Symptoms Improved

The ALJ noted that, in a November 26, 2012 report, Plaintiff reported that his IBS greatly improved. Tr. 19 (citing Tr. 628). “[S]ome improvement,” however, “does not mean that [a claimant’s] impairments no longer seriously affect [the claimant’s] ability to function in a workplace.” *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001). Plaintiff has sought medical treatment for his gastrointestinal issues for over ten years. Tr. 426. He testified that the symptoms are sometimes worse than others. Tr. 59-61. Given his history of complaints and treatment, an isolated report where he reports improvement does not necessarily mean that his “impairments no longer seriously affect [his] ability to function in a workplace.” *Holohan*, 246 F.3d at 1205. Furthermore, a single report of improvement is consistent with Plaintiff’s reports that his symptoms are sometimes worse than other times.

6. Inconsistent Statements

The ALJ noted at least three inconsistencies in Plaintiff’s testimony and self-reports that suggested he was not entirely credible. First, the ALJ noted that Plaintiff received unemployment benefits during the same period he is alleging disability. Tr. 19, 75. Plaintiff testified he was able work during the period he was receiving unemployment benefits. Tr. 19, 78-79. The ALJ noted the inconsistency between how Plaintiff presented himself for receiving unemployment benefits and for his disability applications. Tr. 19. Second, the ALJ noted Plaintiff’s inconsistent reporting regarding his abilities to lift, bend, and walk. Tr. 20 (*comparing* Plaintiff’s September 2011 function report, Tr. 286, *with* Plaintiff’s March 2012 function report, Tr. 321). Third, the ALJ noted Plaintiff gave inconsistent reasons for leaving the Air Force. Tr. 21.

In determining a claimant’s credibility, the ALJ may consider “ordinary techniques of credibility evaluation, such as the claimant’s reputation for lying,

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1 prior inconsistent statements . . . and other testimony by the claimant that appears
2 less than candid.” *Smolen*, 80 F.3d at 1284.

3 The three inconsistencies cited by the ALJ are clear and convincing reasons
4 to question Plaintiff’s credibility.

5 **7. Secondary Gain**

6 The ALJ noted Plaintiff “is receiving [Veterans’ Administration (VA)]
7 disability benefits for [IBS] and therefore has little incentive to report that his
8 condition is anything other than disabling.” Tr. 19. The ALJ pointed to an
9 instance where Plaintiff reported not working because he had been told working
10 might affect his SSI claim. Tr. 21 (citing Tr. 589). In determining a claimant’s
11 credibility, the ALJ may consider “ordinary techniques of credibility evaluation.”
12 *Smolen*, 80 F.3d at 1284. Based on Plaintiff’s reports of receiving VA benefits and
13 not working because he did not want to jeopardize his SSI claim, the ALJ
14 reasonably inferred that Plaintiff may be motivated by secondary gain. This is a
15 clear and convincing reason to question Plaintiff’s credibility.

16 **8. Malingering**

17 Catherine Donaldson, Ph.D., conducted a psychological evaluation of
18 Plaintiff in March 2012 as part of Plaintiff’s treatment through the VA. Tr. 505-
19 511. Dr. Donaldson commented that Plaintiff appeared to exaggerate his
20 symptoms for purposes of secondary gain or possibly malingering. Tr. 22 (citing
21 Tr. 509). In assessing a claimant’s credibility, the ALJ may consider a claimant’s
22 failure “to give maximum or consistent effort during . . . evaluations.” *Thomas v.*
23 *Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002). The ALJ did not rely on Dr.
24 Donaldson’s malingering diagnosis to summarily discredit Plaintiff. Together with
25 other valid reasons, the fact that Dr. Donaldson questioned Plaintiff’s motivations
26 would tend to support the ALJ’s adverse credibility determination.

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1 **9. Conclusion**

2 The ALJ provided many reasons for finding Plaintiff not entirely credible.
3 Some of the reasons are valid, some are not supported by substantial evidence or
4 based on legal error. Given that the Court finds remand necessary for the ALJ to
5 address errors made at step two and in evaluating the medical evidence, the ALJ
6 should also re-evaluate Plaintiff's credibility consistent with this opinion and
7 consistent with the ALJ's reconsideration of the evidence.

8 **C. Evaluation of Medical Evidence**

9 Plaintiff argues the ALJ failed to properly consider and weigh the medical
10 opinions of Drs. Schneider, Moon, Pandolfi and nurse practitioner Ms. Porter.
11 ECF No. 16 at 11-15.

12 "In making a determination of disability, the ALJ must develop the record
13 and interpret the medical evidence." *Howard ex. rel. Wolff v. Barhart*, 341 F.3d
14 1006, 1012 (9th Cir. 2003).

15 In weighing medical source opinions, the ALJ should distinguish between
16 three different types of physicians: (1) treating physicians, who actually treat the
17 claimant; (2) examining physicians, who examine but do not treat the claimant;
18 and, (3) nonexamining physicians who neither treat nor examine the claimant.
19 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
20 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at
21 631. The ALJ should give more weight to the opinion of an examining physician
22 than to the opinion of a nonexamining physician. *Id.*

23 When a physician's opinion is not contradicted by another physician, the
24 ALJ may reject the opinion only for "clear and convincing" reasons. *Baxter v.*
25 *Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a physician's opinion is
26 contradicted by another physician, the ALJ is only required to provide "specific
27 and legitimate reasons" for rejecting the opinion of the first physician. *Murray v.*
28 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

1 **1. Paul Schneider, Ph.D.**

2 Plaintiff presented to Dr. Schneider for a psychological evaluation on April
3 11, 2008, to determine his eligibility for State benefits. Tr. 391. Dr. Schneider
4 diagnosed Plaintiff with several mental impairments including ADHD,
5 predominantly hyperactive-impulsive; anxiety disorder, NOS; narcissistic
6 personality disorder; and, avoidant personality disorder. Tr. 399. Dr. Schneider
7 noted that Plaintiff's test scores raised the question of whether Plaintiff was
8 making a cry for help or exaggerating his symptoms. Tr. 398. Dr. Schneider noted
9 that Plaintiff's behavior issues would be problematic in a work environment and
10 recommended Plaintiff engage in cognitive behavioral therapy. Tr. 399. Plaintiff
11 apparently continued to have "sessions" with Dr. Schneider (possibly for
12 vocational counseling and medication management) through August 2010. Tr.
13 388.

14 The ALJ gave no weight to Dr. Schneider's opinion. Tr. 21. The ALJ
15 reasoned that Dr. Schneider "rendered [his opinions] in April 2008[,] more than a
16 year before the alleged onset date." Tr. 21.

17 The Court finds that the ALJ erred by rejecting Dr. Schneider's opinions for
18 the sole reason that his initial evaluation predates Plaintiff's alleged onset date.
19 Generally, "[m]edical opinions that predate the alleged onset of disability are of
20 limited relevance." *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1165
21 (9th Cir. 2008). Dr. Schneider completed his initial evaluation before Plaintiff's
22 alleged onset date, which would usually make it less relevant. But the fact that Dr.
23 Schneider continued to see Plaintiff into August 2010 for the conditions he
24 diagnosed earlier would suggest that the earlier diagnoses continued to affect
25 Plaintiff into the relevant period. This is a unique situation where it seems
26 improper to summarily discredit Dr. Schneider's opinions based on the date of the
27 initial evaluation. The ALJ erred by rejecting Dr. Schneider's thorough evaluation
28 when he continued to see Plaintiff in the relevant period.

1 On remand, the ALJ should give greater weight to Dr. Schneider's opinions
2 or give additional specific and legitimate reasons for rejecting them. The ALJ
3 might also need to supplement the record to determine the scope and purpose of
4 the "sessions" between Plaintiff and Dr. Schneider. *See Smolen*, 80 F.3d at 1288
5 ("In Social Security cases the ALJ has a special duty to fully and fairly develop the
6 record and to assure that the claimant's interests are considered.").

7 **2. Tae-Im Moon, Ph.D.**

8 Plaintiff presented to Dr. Moon for a psychological/psychiatric evaluation on
9 March 22, 2012. Tr. 467-470. Dr. Moon diagnosed Plaintiff with anxiety disorder,
10 NOS, and ADHD, NOS. Tr. 467. Dr. Moon estimated that Plaintiff would likely
11 be impaired for six to twelve months "with consistent mental health care," Tr. 468,
12 and recommended psychotropic medication, Tr. 469.

13 The ALJ gave little weight to Dr. Moon's opinions. Tr. 21. The ALJ
14 reasoned that Dr. Moon's opinions were vague and based on Plaintiff's unreliable
15 self-reporting, including Plaintiff's inconsistent reporting of his marijuana use. Tr.
16 21-22.

17 The ALJ did not err in giving little weight to Dr. Moon's opinions. The
18 Court agrees that Dr. Moon's opinions are vague; particularly because Dr. Moon
19 provides little information about limitations that would result from Plaintiff's
20 impairments. In describing the effect Plaintiff's symptoms had on his ability to
21 work, Dr. Moon basically regurgitates Plaintiff's subjective complaints. Tr. 468.
22 The only limitation assessed by Dr. Moon was that Plaintiff's short term recall
23 might "interfere with his ability to remember complex instructions." Tr. 468. The
24 ALJ's other reasons for discounting Dr. Moon's opinions are also specific and
25 legitimate reasons. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008)
26 (medical opinion may be discounted if it relies on a claimant's unreliable self-
27 report); *Morgan*, 169 F.3d at 602-603 (ALJ need not accept a medical opinion that
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1 fails to take into account a claimant's drug or alcohol use). The ALJ did not err in
2 giving little weight to Dr. Moon's opinions.

3 **3. Catherine Donaldson, Ph.D.**

4 Dr. Donaldson performed a psychological evaluation on March 21, 2012, as
5 part of Plaintiff's treatment through the VA. Tr. 505-511. Dr. Donaldson
6 diagnosed Plaintiff with marijuana intoxication/dependence; mood disorder, NOS;
7 antisocial personality disorder, psychopathic; and borderline traits. Tr. 510.

8 The ALJ assigned some weight to Dr. Donaldson's opinion that Plaintiff
9 might be exaggerating his symptoms or possibly malingering. Tr. 22. The ALJ
10 did not otherwise discuss Dr. Donaldson's opinions and observations.

11 The ALJ erred in giving weight only to Dr. Donaldson's comment about
12 Plaintiff's possible exaggerating or malingering without giving reasons for
13 rejecting Dr. Donaldson's other opinions. Dr. Donaldson diagnosed Plaintiff with
14 having an antisocial personality disorder and observed that, as a manifestation of
15 this disorder, Plaintiff "externalized blame for his dysfunction to everyone else in
16 his life." Tr. 510. As discussed *supra* and *infra*, this diagnosis is consistent with
17 Dr. Schneider's diagnoses and the observations of Plaintiff's medical providers,
18 including Ms. Porter. The ALJ should not have simply given weight to the
19 portions of Dr. Donaldson's opinion that support his finding of non-disability.

20 On remand, the ALJ should credit or give additional specific and legitimate
21 reasons for discounting Dr. Donaldson's opinions. The Court notes there are
22 potentially several reasons to give Dr. Donaldson's opinions little weight (e.g.,
23 Plaintiff cut the evaluation short and apparently never scheduled an appointment to
24 complete the evaluation, Dr. Donaldson suspected that Plaintiff was intoxicated at
25 the time of the evaluation), but the Court cannot uphold the ALJ's decision based
26 on "grounds upon which [the ALJ] did not rely." *Orn*, 495 F.3d at 630.

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1 **4. Gonzalo Pandolfi, M.D.**

2 Plaintiff saw Dr. Pandolfi at Yakima Gastroenterology Associates
3 approximately five times between June 16, 2009, and March 29, 2011. Tr. 376-
4 383. Dr. Pandolfi treated Plaintiff for abdominal pain. Dr. Pandolfi performed two
5 colonoscopies and one upper endoscopy. Tr. 381-383. On June 1, 2011, Dr.
6 Pandolfi wrote a note (possibly in support of Plaintiff's application for State
7 benefits) in which he opined that Plaintiff's stomach issues "could have an effect
8 on [Plaintiff's] ability to sit for long periods of time." Tr. 385.

9 The ALJ gave no weight to Dr. Pandolfi's note dated June 1, 2011. Tr. 22.
10 The ALJ reasoned Dr. Pandolfi's note was unsigned; the opinions were vague and
11 unsupported by the record; and Dr. Pandolfi did not address the extent to which the
12 diagnosed impairments would affect Plaintiff's ability to sit. Tr. 22. The ALJ also
13 found Dr. Pandolfi's opinion inconsistent with Plaintiff's March 2012 function
14 report in which he indicates no problem sitting. Tr. 22, 321. The ALJ did not
15 otherwise discuss Dr. Pandolfi's opinions except when the ALJ noted Plaintiff's
16 "workup at Yakima Gastroenterology Associates was essentially negative." Tr. 20.

17 The ALJ did not err in giving no weight to Dr. Pandolfi's note dated June 1,
18 2011. As noted by the ALJ, the opinion is not supported by the record and does
19 not provide specific limitations or a basis for the opinions. *See Thomas*, 278 F.3d
20 at 957 (ALJ may reject a medical opinion that is "inadequately supported by
21 clinical findings"); *Batson*, 359 F.3d at 1195 (ALJ may reject opinions that are
22 "brief" or "conclusory"). As noted by the ALJ, Plaintiff's own self-reporting
23 contradicts Dr. Pandolfi's opinion, which is a strong indication that Dr. Pandolfi's
24 opinion is not entirely reliable. The ALJ gave specific and legitimate reasons for
25 giving little weight to Dr. Pandolfi's opinions.

26 **5. Minninder Sandhu, M.D.**

27 Dr. Sandu completed a mental medical source statement on July 24, 2013.
28 Tr. 755-758. Although the statement was signed prior to the date of the hearing,

1 Dr. Sandu's statement was not part of the record before the ALJ. Plaintiff
2 submitted this evidence directly to the Appeals Council, which the Appeals
3 Council considered and made part of the administrative record. Tr. 5. The Court
4 must consider evidence submitted to the Appeals Council that the Appeals Council
5 reviewed in deciding whether to review the ALJ's decision. *Brewes v. Comm'r of*
6 *Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012).

7 Dr. Sandu opined that Plaintiff "meets the criteria for Generalized Anxiety
8 Disorder." Tr. 758. Dr. Sandu commented that Plaintiff's "significant anxiety
9 [and] chronic pain" would likely "interfere with his daily functioning." Tr. 757.
10 Dr. Sandu opined that Plaintiff's anxiety would affect his ability to interact with
11 authority figures and other people. Tr. 757. In a check box form, Dr. Sandu
12 indicated Plaintiff's anxiety would cause several moderate and marked limitations
13 in different areas of functioning. Tr. 756. Dr. Sandu referred to evaluations he
14 performed on May 8, 2013, and June 12, 2013, for more details supporting his
15 opinions. Tr. 758.

16 The Court finds Dr. Sandu's opinions concerning Plaintiff's anxiety mostly
17 consistent with the opinions of Plaintiff's other treating and examining sources,
18 including Drs. Schneider and Dove. It is entirely unclear, however, how Dr. Sandu
19 reached his conclusions or his relationship with Plaintiff. The earlier evaluations
20 that Dr. Sandu refers to in his mental medical source statement might shed some
21 light on these areas. On remand, the ALJ should consider Dr. Sandu's statements.
22 The ALJ should also supplement the record—through interrogatories, subpoena of
23 the evaluations referred to in Dr. Sandu's mental medical source statement, or
24 otherwise—to determine the basis of Dr. Sandu's opinions.

25 **6. Sarah Porter, ARNP**

26 Generally, the ALJ should give more weight to the opinion of an acceptable
27 medial source than to the opinion of an "other source," such as a nurse practitioner.
28 20 C.F.R. §§ 404.1513(d), 416.913(d). An ALJ is required, however, to consider

1 evidence from “other sources,” 20 C.F.R. §§ 404.1513(d), 416.913(d); S.S.R. 06-
2 03p, “as to how an impairment affects a claimant’s ability to work,” *Sprague*, 812
3 F.2d at 1232. An ALJ must give “germane” reasons to discount evidence from
4 “other sources.” *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993). Germane reasons
5 to discount an opinion include contradictory opinions and lack of support in the
6 record. *Thomas*, 278 F.3d at 957.

7 Ms. Porter treated Plaintiff for his abdominal issues and anxiety at Yakima
8 Neighborhood Health Services (between December 2011 and June 2012). Tr. 409-
9 413, 421-424, 684-687, 692-695. On August 25, 2011, Ms. Porter completed a
10 form as part of Plaintiff’s application for State benefits. Tr. 463-464. Ms. Porter
11 opined that Plaintiff’s work function was impaired by his physical impairments,
12 which she estimated would last six months. Tr. 463. Ms. Porter completed an
13 identical form on January 19, 2012, in which she noted that Plaintiff could stand
14 for six hours in an eight hour workday, could sit for prolonged periods, could lift a
15 maximum of fifty pounds, and could frequently lift twenty five pounds. Tr. 465.

16 The ALJ gave no weight to Ms. Porter’s opinions contained in the August
17 2011 DSHS form. Tr. 22. The ALJ reasoned that Ms. Porter is not an acceptable
18 medical source, she opined that Plaintiff’s limitations would last for a six month
19 period, and her opinions were not supported by objective signs or findings or any
20 other rationale. Tr. 22. The ALJ gave more weight to Ms. Porter’s opinions
21 contained in the January 2012 DSHS form. Tr. 22. But again, the ALJ noted that
22 Ms. Porter “did not cite any objective signs or findings or provide any rationale in
23 support of the opinion.” Tr. 22.

24 Simply because Ms. Porter is not an acceptable medical source is not a
25 germane reason to discount her assessments of Plaintiff’s limitations. *See Sprague*,
26 812 F.2d at 1232 (an ALJ is required to consider evidence from “other sources,”
27 “as to how an impairment affects a claimant’s ability to work.”). But the ALJ’s
28 reasoning that Ms. Porter’s opinions are not supported by objective evidence and

1 that she estimated Plaintiff's impairments would last only six months are germane
2 reasons for giving the opinions little weight. *See Thomas*, 278 F.3d at 957 (ALJ
3 may reject a medical opinion that is "inadequately supported by clinical findings");
4 42 U.S.C. § 1382c(a)(3)(A) (disability must be premised on medically
5 determinable physical or mental impairments that have "lasted or can be expected
6 to last for a continuous period of not less than twelve months").

7 **D. RFC and Hypothetical Questions**

8 Plaintiff argues that the ALJ's step four finding is flawed because the ALJ's
9 hypothetical question to the VE was incomplete. ECF No. 16 at 18-20. Plaintiff
10 argues that the ALJ's hypothetical question should have taken into account
11 Plaintiff's need to take frequent bathroom breaks; miss several days of work a
12 month due to anxiety; issues associated with coworkers; paying attention; and
13 ADHD. ECF No. 16 at 18-20.

14 Given the ALJ's errors at step two and in evaluating the medical evidence,
15 the Court will remand this case so the ALJ can re-evaluate Plaintiff's impairments
16 and RFC consistent with this opinion. If warranted, the ALJ may also elicit the
17 testimony of a medical expert to assist the ALJ in formulating a new RFC
18 determination.

19 **REMEDY**

20 The decision whether to remand for further proceedings or reverse and
21 award benefits is within the discretion of the district court. *McAlliser v. Sullivan*,
22 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
23 where "no useful purpose would be served by further administrative proceedings,
24 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
25 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
26 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
27 (9th Cir. 1990). *See Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
28 (noting that a district court may abuse its discretion not to remand for benefits

1 when all of these conditions are met). This policy is based on the “need to
2 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are
3 outstanding issues that must be resolved before a determination can be made, and it
4 is not clear from the record that the ALJ would be required to find a claimant
5 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
6 *Benecke v. Barnhart*, 379 F.3d 587, 595-596 (9th Cir. 2004); *Harman v. Apfel*, 211
7 F.3d 1172, 1179-1180 (9th Cir. 2000).

8 In this case, it is not clear from the record that the ALJ would be required to
9 find Plaintiff disabled if all the evidence were properly evaluated. Further
10 proceedings are necessary for the ALJ to evaluate the medical evidence consistent
11 with this opinion. The ALJ may also need to supplement the record, reevaluate
12 Plaintiff’s credibility, and, if necessary, determine the disability onset date. The
13 ALJ shall obtain supplemental testimony from a VE and take into consideration
14 any other evidence or testimony relevant to Plaintiff’s disability claim.

15 CONCLUSION

16 Having reviewed the record and the ALJ’s findings, the Court finds the
17 ALJ’s decision is not entirely supported by substantial evidence and contains legal
18 error. Accordingly, **IT IS ORDERED:**

19 1. Defendant’s Motion for Summary Judgment, **ECF No. 21**, is
20 **DENIED**.

21 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 16**, is
22 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
23 additional proceedings consistent with this Order.

24 3. Application for attorney fees may be filed by separate motion.

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1 The District Court Executive is directed to file this Order and provide a copy
2 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
3 and the file shall be **CLOSED**.

4 DATED July 6, 2015.

A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE